

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT DELLAIRO,)	
)	
Plaintiff)	
)	
v.)	Civil No. 02-42-B-C
)	
TIMOTHY GARLAND,)	
)	
Defendant)	

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT
IN 42 U.S.C. § 1983 ACTION**

Robert Dellairo, an inmate serving a nine-month sentence at the Penobscot County Jail has brought a pro se 42 U.S.C. § 1983 complaint against Timothy Garland, who treated Dellairo for medical conditions while he was at the jail. Dellairo alleges that Garland infringed Dellairo's Eighth Amendment right to be free from cruel and unusual punishment. (Docket No. 1.) Specifically, Dellairo complains that Garland was deliberately indifferent in responding to a growth in Dellairo's ankle that causes substantial pain and threatens long-term impairment if left untreated. Earlier the Court denied Garland's motion to dismiss. (Docket Nos. 15 & 17.) Garland has now filed a motion for summary judgment accompanied by a statement of material facts (Docket Nos. 47 & 48) to which Dellairo has not responded. Having fully reviewed the uncontested factual support for Garland's argument that he is entitled to summary judgment, I recommend that the Court **GRANT** the motion.

DISCUSSION

Legal Standards

Garland is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [Garland] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I review the record in the light most favorable to Dellairo, the (silent) opponent of summary judgment, and I indulge all reasonable inferences in his favor. See Feliciano De La Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000). However, the fact that Dellairo has failed to place a single one of Garland's facts in dispute means that I deem the properly supported facts as admitted, see Faas v. Washington County, ___ F. Supp. 2d ___, 2003 WL 2013101, *2 (D. Me. May 2, 2003). Dellairo's pro se status does not relieve him of his duty to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor alter the Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

The constitutional standard for a deliberate indifference claim has been framed by the United States Supreme court in two cases: Estelle v. Gamble, 429 U.S. 97 (1976) and Farmer v. Brennan, 511 U.S. 825 (1994). Estelle provided that the Eighth Amendment

protection places upon the government an “obligation to provide medical care for those whom it is punishing by incarceration.” 429 U.S. at 103. The Court observed: “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Id.*; see also *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (“[T]he substantive limits on state action set by the Eighth Amendment,” when it “so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs” including food and medical care).

In *Farmer* the Court directed its attention to articulating the standard a plaintiff must meet to hold a prison official liable for Eighth Amendment claims of the type framed by *Dellairo*. It identified two prongs. First, the deprivation alleged must be “objectively ‘sufficiently serious.’” 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, under *Farmer*, the defendant must have a culpable state of mind, which means that the defendant was deliberate in his indifference to the inmate’s health or safety. *Id.* As will become apparent below, the resolution of this motion does not require a more precise articulation of this standard.

Factual Allegations in Dellairo’s Complaint

In order to give some context for Garland’s rebuttal of *Dellairo*’s claim it is necessary to recap the allegations of *Dellairo*’s complaint. As summarized in the order recommending that the Court deny the motion to dismiss, *Dellairo* alleged as follows:

In September 2001, one week prior to his incarceration, *Dellairo* was seen in the emergency room of the Eastern Maine Medical Center by a doctor. That doctor told *Dellairo* that he had a growth in his left ankle that was growing into the bone and needed surgery. He prescribed a pain medication in the interim. The surgery was scheduled but prior to the date set for the surgery *Dellairo* was incarcerated at the Penobscot County Jail.

At the jail Dellairo was seen by Garland on October 12, 2001, at which point Dellairo described the problems with his left ankle, explained that the growth was growing into his bone, complained that he was in serious pain, and reported that the doctor he had seen just prior to his incarceration had recommended surgery. Garland said he would send for Dellairo's x-rays and get back to him. Several months went by without action by Garland.

During the six months prior to the filing of the complaint Dellairo filled out many medical slips and lodged three grievances. In response to his December 5, 2001, grievance Garland stated that Dellairo's doctor was not refilling his pain medication. Dellairo explains that the pain medication referred to by Garland was for his back and not his left ankle and that Garland should have made sure that he was clear on whether there was an order for pain killer vis-à-vis the ankle. When Dellairo was seen on February 15, 2002, in response to his third grievance Garland became agitated and asked Dellairo to leave his office. With respect to Garland's description of Dellairo as "loud, demanding, and uncooperative" in his report on this interaction, Dellairo states that he was not acting in this manner and that it was Garland who was upset because of Dellairo's efforts to press Garland for treatment.

Finally, after six-months Garland ordered x-rays and concluded that there is a growth in the ankle. However, according to Dellairo, Garland feels "that no further treatment is necessary."

Dellairo alleges that he is in serious pain; that his ankle "hurts extremely bad." He describes shooting pains that spike up to his knee. He has a hard time walking, rotating his ankle, and laying on his left side where the ankle is flush with the bed. After seven months the pain is getting worse. He has been given no pain medication, not even Tylenol.

Dellairo v. Garland, 222 F.Supp.2d 86, 88 -89 (D.Me. 2002) (Kravchuk, Magis. J.).

Garland's Entirely Undisputed Material Facts

Garland's summary judgment facts tell a different tale. Garland's first medical visit with Dellairo was on October 12, 2001. Just prior to this visit Garland reviewed the jail's medical records on Dellairo. These records contained a faxed request, dated September 25, 2001, sent by the jail to Dellairo's physician, Doctor Bragg, seeking information regarding Dellairo's pre-incarceration care. This information request indicated that if Percocet was to be prescribed for Dellairo then Bragg would have to prescribe the

medication and see to its delivery to the jail. At the time of Dellairo's first visit with Garland there was no indication in the file that there had been a reply to the fax or that Bragg had prescribed Percocet or any other narcotic pain medication for Dellairo. Garland interpreted this silence as an indication that Bragg did not recommend that Dellairo receive a narcotic pain reliever, such as Percocet.

On October 12, 2001, Garland examined Dellairo who was complaining of pain in his left ankle, pain Dellairo attributed to a growth or cyst in the area. Garland determined that the ankle appeared normal except for Dellairo's subjective complaints of pain. Garland's decision not to prescribe pain medication at this point was based on the objectively normal examination, the fact that Dellairo had been at the jail for several weeks before he sought medical attention, and the lack of a response to the fax by Bragg. During this examination Dellairo indicated that he had been examined and treated at a nearby hospital emergency room for the growth or cyst. As a consequence, Garland asked a nurse at the jail to obtain records from the hospital.

By November 9, 2001, Garland had obtained Dellairo's medical records from his pre-incarceration primary care doctors. These records indicated that Dellairo had been receiving narcotics for back pain rather than pain in his left ankle. The records also revealed that a Doctor Long had recommended strongly against narcotics for pain and had made a determination that there was nothing amiss orthopedically. These comments Garland assumed related to Dellairo's back difficulties but Garland did take it as a contraindication for the prescription of pain medication.

Taking his examination, the silence of Bragg with respect to Percocet, and these pre-incarceration records together, Garland concluded that there was no further medical

intervention required and that Dellairo was exhibiting drug seeking behavior not motivated by a true need for pain medication.

Some time prior to December 7, 2001, Garland reviewed the jail's medical records on Dellairo and found that records from the local hospital had not been received by the jail. At this juncture Garland noticed that the fax request was dated October 12, 2001. Garland asked the nurse to follow-up on the records and, specifically, to request x-rays.

On January 18, 2002, Garland again examined Dellairo who was complaining of lower abdominal pain. Garland found that his objective examination was consistent with Dellairo's subjective complaint and he prescribed 400 mg of ibuprofen twice a day for the pain.

Dellairo was scheduled to see Garland again on February 1, 2002, concerning the growth in his ankle. However, Dellairo did not see Garland as scheduled and his medical records contain a form, signed by Dellairo, refusing medical care, and acknowledging that his refusal could result in the discontinuance of medication and treatment.

On February 15, 2002, Dellairo again presented with complaints of left ankle pain. Upon observing Dellairo on that day during a visit, Garland could not discern any objective signs to verify Dellairo's complaints of pain. At this time Dellairo became argumentative and Garland terminated the examination, concluding that Dellairo was exhibiting drug seeking behavior and was not motivated by a true need for pain medication. At this point Garland again reviewed Dellairo's jail medical records and discovered that they did not contain records or x-rays from the local hospital. He noted that a fax was sent on December 7, 2001, (the date of Garland's last request that the fax

be sent) asking for x-rays. A reply had been received from the hospital indicating “NO Records.”

With there being no x-ray or x-ray reports in the jail’s medical file, Garland ordered an x-ray of Dellairo’s left foot and ankle. An x-ray was taken on February 18, 2002, and Garland reviewed the report within a week. Based on this report, the jail’s records, and Garland’s prior observations and examination, Garland concluded that it was unlikely that this growth was causing Dellairo any significant pain. Garland concluded that prescription pain medication was not indicated and no medical intervention was needed at that juncture.

All medical records generated by Garland at the jail were reviewed and initialed by a duly licensed and practicing medical doctor. At no time did this doctor suggest to Garland that his care and treatment of Dellairo was inappropriate, inadequate, or insufficient.

Finally, Garland has designated an expert, John D. West, III, M.D. He is a licensed and practicing medical doctor who specializes in orthopedic surgery. He is a well-credentialed, certified orthopedic surgeon. He reviewed Dellairo’s medical, mental health, and pharmacy records prior to incarceration at the jail, during incarceration, and after incarceration. West is familiar with the standard of care applicable to the general practice of medicine by a primary care physician.

West arrived at the following opinions with respect to Garland’s treatment of Dellairo. It was reasonable for Garland to conclude that the condition of Dellairo’s left ankle was not causing him pain during the period of his incarceration at the jail. The growth in Dellairo’s ankle is of the type that generally develops prior to adolescence and

stops growing by the end of adolescence. It is not likely that the growth would only begin causing pain at this stage in Dellairo's life. Furthermore -- notwithstanding Dellairo's extensive, recorded medical history -- prior to August 9, 2001, there is no indication that Dellairo ever reported to any health care provider that he experienced pain in the left ankle. The growth was discovered by coincidence, in that, according to the records of a local hospital, Dellairo was involved in a physical altercation during which he received a blow to the left ankle. X-rays of the ankle revealed the growth. There is no reason to expect that the previously pain-free condition would suddenly become and remain painful.

Based on Garland's physical examinations of Dellairo's left ankle and on his observation of Dellairo, West believes that it was reasonable for Garland to conclude that Dellairo was exhibiting drug seeking behavior not motivated by a true need for pain medication. The correctness of Garland's conclusion in this regard is further supported by the medical records that West reviewed. These records reflect numerous instances of similar behavior and the observations of numerous medical providers indicating concerns over Dellairo's use of pain medication, and in some cases, their outright refusal to prescribe narcotics to Dellairo. Dellairo's outburst during his visit with Garland on February 15, 2002, was consistent with his prior drug seeking behavior and prior episodes in which Dellairo became belligerent and argumentative when medical providers refused to prescribe narcotics.

West concluded it was not necessary for Dellairo to undergo surgery to remove the growth in his left ankle during the period of his incarceration at the jail. The x-rays taken on February 18, 2002, reflect no change since x-rays taken six months prior, in the

opinion of Stephen Barr, M.D. of the Maine Orthopedic Center in Portland, Maine, who examined Dellairo in early January 2003.

In arriving at the above opinions West relied on his education and training, his experience treating patients and reviewing records of other health care providers throughout his education and career, and Dellairo's medical, mental health, and pharmacy records.

Resolution

Based on the supported material facts presented by Garland, and left uncontested by Dellairo, I conclude that, there being no genuine issue as to any of the material facts, Garland is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). Giving Dellairo the benefit of all reasonable inferences, Garland's course of treatment amounts, at the most, to no more than negligence or medical malpractice. See Daniels v. Williams, 474 U.S. 327, 335-36 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights violations and cannot be used to sue correctional officials for negligence). It seems to be no more than a dispute about the proper course of treatment and Dellairo's discontent with Garland's skepticism towards his condition. See Rivera v. Alvarado, 240 F.Supp.2d 136, 143 (D.P.R. 2003) ("A bad attitude by a medical provider or a doctor's negligence in his choice of medications or treatment is not actionable under the Eighth Amendment."); Dennison v. Prison Health Servs., 2002 WL 31026529, 7 (D.Me. 2002) (Kravchuk, Magis. J.) ("Inmates do not have a right to limitless doctor visits or their choice of medications and negligence and medical malpractice are not actionable. Without a sufficiently serious deprivation of medical care there can be no constitutional violation; a bad attitude by a prison medical provider toward an inmate is not in and of

itself actionable,” citing Daniels). In other words, these facts simply do not form a basis for concluding that Garland was deliberately indifferent to Dellairo’s medical needs within the meaning of Farmer.

Conclusion

For the reasons stated above I recommend that the Court **GRANT** the motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 7, 2003

PRISONERCIVILRIGHTS

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00042-GC
Internal Use Only**

DELLAIRO v. GARLAND, et al
Assigned to: JUDGE GENE CARTER
Referred to:

Date Filed: 03/04/02
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil

Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Rights
Jurisdiction: Federal Question

Plaintiff

ROBERT DELLAIRO

represented by **ROBERT DELLAIRO**
MAINE STATE PRISON
807 CUSHING ROAD
WARREN, ME 04864-4600
PRO SE

V.

Defendant

TIMOTHY GARLAND

represented by **STEVEN J. MOGUL**
GROSS, MINSKY & MOGUL,
P.A.
P.O. BOX 917
23 WATER ST.
BANGOR, ME 04401
207-942-4644
LEAD ATTORNEY
ATTORNEY TO BE NOTICED